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CFPB Challenges Financial Institutions to Produce Evidence of Affirmative Consent to Overdraft Fees

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On September 17, 2024, the Consumer Financial Protection Bureau (CFPB) issued a circular explaining that financial institutions may violate the Electronic Fund Transfer Act (EFTA) and its implementing regulation, Regulation E, by charging consumers certain overdraft fees without affirmative proof of consumer consent to be charged overdraft fees. The circular highlights the importance of maintaining evidence of an individual consumer's consent to overdraft services and incurring the resulting fees. In a footnote to the circular, the CFPB opines that Regulation E's two-year record retention requirement is an "independent legal obligation," and it does not change the fact that an "absence of records" – presumably even if the record retention period has expired – is still "suggestive that a consumer did not opt in."

Financial institutions carry burden of proof prior to levying overdraft fees

The EFTA and Regulation E prohibit financial institutions from charging overdraft fees on ATM and one-time debit card transactions without the consumer's affirmative consent. Specifically, Regulation E requires financial institutions to:

- Provide consumers a reasonable opportunity to affirmatively consent, or opt in, to overdraft services.
- Obtain the affirmative consent from the consumer before charging the consumer any overdraft fees.
- Provide the consumer with confirmation of the consent that includes a statement informing the consumer of their right to revoke that consent.

The circular notes the CFPB has found in examinations that financial institutions maintain policies and procedures consistent with Regulation E's opt-in requirements, but that in certain circumstances, they could not provide evidence of a specific consumer's affirmative consent. The CFPB further indicated it concluded in certain instances that a financial institution improperly obtained consent through deceptive or abusive practices.

To address this concern, the CFPB opines that acceptable evidence a consumer has opted in to overdraft services includes retaining a:

- Copy of signed or initialed form by consumer indicating the consumer's affirmative consent to opting in to covered overdraft services.
- Recording of the phone call in which the consumer elected to opt in to covered overdraft services.
- Securely stored and unalterable electronic signature demonstrating the consumer's assent to affirmatively opt in to covered overdraft services along with the date the consumer opted in.

The circular suggests that institutions disposing of evidence of compliance outside Regulation E's two-year record retention period may be unable to prove the consumer opted in to overdraft services, in which case the consumer must be treated as not having opted in.

Looking ahead

The circular is the latest of many CFPB interpretations aimed at curtailing fee assessment, and it follows several public enforcement actions related to overdraft fee practices. In January 2024, the CFPB issued a proposal that would require large banks to treat overdraft services as credit subject to Regulation Z, and in July 2024, the CFPB warned banks against assessing fees for providing information services to consumers as part of its update

on implementation of its Section 1034(c) advisory opinion. Financial institutions may need to review their overdraft and record retention policies in light of the circular, as the CFPB continues to focus on fee assessment practices and overdraft in particular.

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